

In the Application of:
Jesse H. GAYTAN
Serial No. 09/801,871

REMARKS

Claims 1-31, 33, 34, and 44 stand withdrawn or cancelled.

Claims 45, 47, and 57 have been rewritten into an independent form, as suggested by the examiner, with new dependent claims 61-81 crafted from those that were dependent on rejected base claims, e.g., claims 35, 40, 41 and 49-56. Allowance is respectfully requested for claims 45-47, 57, and 61-80. Claims 58 and 60 have been allowed.

Three grounds for rejection have been applied against the pending claims. Each will be addressed in turn.

1. Claims 32, 35, 36, 42, 49, 51, 52 and 59 have been rejected as anticipated by or obvious from Masahiko et al. (JP 07-29180).

Masahiko teaches a water-soluble granular composition comprising an active ingredient ("A") and a water soluble weakly basic substance ("B") exhibiting a pH from 7.0 to 9.0 at 25°C. The compositions of Masahiko may contain a non-ionic surfactant in an amount from 0.05 to 5 % by weight. Masahiko does not, however, teach that these surfactants are solid at ambient temperature nor that they have binding properties. Rather, Masahiko makes a clear distinction between binders (such as dextrin, polyvinyl alcohol, gum arab, sugars etc.) and surfactants (see paragraph 0008).

Although Masahiko mentions acephate as a possible ingredient, this document does not teach a composition that fulfills all of the requirements of present claim 32 nor of any other rejected claims. In particular, this document does not teach granules containing a phosphoramido(di)thioate, from 0.2 to 3 % by weight of a polyoxyalkylene binder which is solid at ambient and a solvent for said polymeric binder in an amount of less than 1% by weight. Masahiko does not anticipate the claimed subject matter.

As to obviousness, there is no motivation or suggestion from within the reference or the art that would provide the required impetus to form the modifications necessary so as to arrive at the claimed invention. For example, Masahiko is concerned with the storage stability of water soluble insecticides in granular compositions without spoiling their solubility in water.

In particular, Masahiko is concerned with the problems of formulating nitenpyram into granules. Nitenpyram, however is a nitromethylene insecticide, which is a substantially different class of chemistry relative to phosphoramido(di)thioates. Nothing in the art or this reference links a storage solution for nitenpyram to the problems encountered with the preparation of phosphoramido(di)thioate granules.

Masahito seeks to solve his problem by incorporating a weak base (see claim 1). The disclosure does not attach much importance to the surfactant or even to the type of surfactant. In fact, working examples 1 to 5 do not contain a surfactant at all, alone a polyalkylene ether which is solid at ambient temperature. Moreover, working example 6 of Masahito teaches the use of cane sugar and a surfactant thereby drawing a clear distinction between binders and surfactants, contrary to the present invention. Thus, a skilled person would not have been taught or directed by Masahito to incorporate from 0.2 to 3 % of a solid polyalkylene ether as a binder/lubricant in a phosphoramido(di)thioate-containing granule. Masahito would not have rendered obvious the claimed subject matter.

2. Claims 32, 35, 36, 41-43, 49-56 and 59 have been rejected as obvious from a combination of Chan et al. (US 5,100,667) and pages from the ICI Dictionary description of POLAXAMER materials. This is an augmented grounds for rejection from the prior Action. The ICI Dictionary pages were cited in support of the assertion that the ICI PLURONIC products are polymers that exhibit melting points within those of the claimed invention.

Nothing in the combination of Chan et al. '667 and the ICI Dictionary pages teaches or suggests that a composition should be formed that exhibits "a residual amount of solvent for said polymeric lubricant in an amount of less than 1 wt%." Chan specifically seeks to avoid any use of any solvent in the disclosed granule. See, col. 5 at lines 2-3 and p. 14 of the previous Response. Such a negative incentive teaches away from the claimed invention and does not support a *prima facie* case of obviousness, as is required.

The happenstance presence of some adsorbed moisture in the materials used by Chan et al. does not lead to a conclusion of obviousness. Obviousness does not happen by

accident. See, *Jones v. Hardy*, 220 USPQ 1020, 1024-25 (Fed. Cir. 1984) (anticipation by inherency is a distinct concept from obviousness).

The inquiry for obviousness is properly on whether what the inventor did would have been obvious from the teachings of the prior art for solving the problem faced by the inventor. See, *In re Antonie*, 195 USPQ 6,8 (CCPA 1977) and *Diversitech Corp. v. Century Steps, Inc.*, 7 USPQ2d 1315, 1318 (Fed. Cir. 1988). Explanations for obviousness based on selective hindsight are inappropriate. *In re Dow Chemical Co.*, 5 USPQ2d 1529, 1532 (Fed. Cir. 1988). The desirability of making any modification to the prior art -- such as advantageously using a polymeric binder that also happens to become surprisingly lubricious when a small amount of solvent is added to permit extrusion granulation with low frictional heat through the die but dry to a durable binder for the granule -- must come from within the art to support a conclusion of obviousness. See, *In re Fritch*, 23 USPQ2d 1780, 1782 (Fed. Cir. 1992).

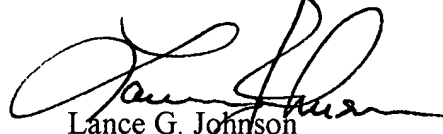
3. Claims 36-40 and 48 stand rejected for the previously presented combination of Chan et al. and Kishino et al. (US 4,150,155).

The rejection based on the combination of Chan et al. and Kishino et al. is premised on the same notion as the combination of Chan et al. and the ICI Dictionary pages (*supra*). Nothing in Kishino et al. contradicts the discouragement of solvents in the acephate granule of Chan et al. or teaches that the combination of the right polymeric binder and a small amount of solvent for that binder can be used to advantage in forming extruded granules that experience low extrusion frictional heat with the attendant reduction in exposure to the sorts of high heats that degrade acephate. The required *prima facie* case of obviousness is simply not presented by a combination of Chan et al. and Kishino et al. This is even more evident when one considers that Kishino et al. relates to a liquid pesticide.

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Reconsideration and allowance are respectfully requested.

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